IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 77-137

WAYNE EARL ELLISON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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UNITED STATES OF AMERICA,
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To the United States Court of Appeals for the Seventh Circuit

The petitioner, Wayne Earl Ellison, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceedings on June 29, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (together with that court's judgment) is printed in the Appendix hereto, *infra*, p. A-1. The opinion is as yet unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 29, 1977. No petition for rehearing was filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Is incompetency of counsel ""newly discovered" evidence under Rule 33 of the Federal Rules of Criminal Procedure?
2. Should there be uniform standards for counsel's competence?

RULE INVOLVED

The rule here involved is from the Federal Rules of Criminal Procedure.

> "**Rule 33. New trial.**—The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

STATEMENT OF THE CASE

A multiple count indictment was filed against the petitioner, in the United States District Court for the Southern District of Indiana. This charged him with conspiracy to distribute controlled substances and with numerous counts of distributing controlled substances in violation of 21 U.S.C. § 841 (a)(1). The general theory of the government's case was that the petitioner and a physician conspired to distribute controlled substances without a legitimate medical purpose.

Before the trial the government dismissed a number of counts.

The case was tried to a jury, which on February 6, 1976, returned verdicts of guilty on the conspiracy count and seven of the substantive counts. On March 2, 1976, the District Court imposed an 18-month prison sentence on the conspiracy count and 18-month concurrent sentences on the substantive counts. On March 10, 1976 petitioner filed a notice of appeal from that sentence.

In the meantime petitioner secured new counsel, and on April 20, 1976, he filed a motion for a new trial with a supporting affidavit, charging incompetency of counsel. (Since this motion and affidavit are highly significant in this petition they are attached as Appendix B hereto.) On May 28, 1976, without a hearing, the District Court denied the petitioner's motion for a new trial. Petitioner filed a notice of appeal from this order on June 4, 1976. The Court of Appeals ordered these two appeals consolidated.

REASONS FOR GRANTING THE WRIT

1. *The Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decision of another court of appeals on the same matter.*

In the instant case the Court of Appeals for the Seventh Circuit held that a claim of ineffective-assistance-of-counsel cannot be "newly discovered" evidence under Rule 33 of the Federal Rules of Criminal Procedure. In the case of *United States v. Brown*, 476 F. 2d 933, 935 (D.C. Cir. 1973), the court held that "evidence of the ineffectiveness of trial counsel * * * brought to the attention of the court for the first time in support of [a motion for a new trial] is 'newly discovered' for * * * purposes of Rule 33." See also *Marshall v. United States*, 436 F. 2d 155 (D.C. Cir. 1970); *United States v. Thompson*, 475 F. 2d 931 (D.C. Cir. 1973), and *United States v. Smallwood*, 473 F. 2d 98 (D.C. Cir. 1972).

Petitioner urges the Court that the construction placed upon Rule 33 by the District of Columbia Circuit is the only one which affords defendants a meaningful device for attacking ineffective assistance of counsel. Consider the ways in which that question can be raised: Since it will not ordinarily appear in the record it cannot be raised in an initial appeal, unless the issue is somehow brought into the record. The device utilized by petitioner below seems to be a simple and necessary means of raising the question. Requiring an aggrieved defendant to first appeal, and then come back to the Court with a post conviction proceedings pursuant to 28 U.S.C. § 2255 or with an application for a writ of coram nobis generates multiplicity of litigation and can force such defendant into prison in order to assert his rights. The same Court passing on this case has permitted the matter to be raised in a collateral attack in habeas corpus: *United States ex rel. Williams v. Twomey*, 510 F. 2d

634 (7th Cir. 1975). This Honorable Court can appreciate that, assuming a defendant is aware of the incompetence of his trial counsel, he will be hard pressed to find other counsel willing and prepared to attack a brother at the bar within seven days of a verdict. Further, usually a defendant does not know whether he will be imprisoned or probated at such an early date. Many defendants, anticipating that it would be comparatively easy to live with probation, would be reluctant to continue the legal contest until they knew their fate.

2. *The Court of Appeals has failed to decide the important question of federal law which has not been, but should be, settled by this Court.*

The next reason for granting certiorari, although not written on by the Court of Appeals, was discussed in petitioner's brief in that court. If this Court were to take review herein on Reason No. 1, *supra*, it could render an invaluable service to American jurisprudence by establishing standards for effectiveness of counsel. It would seem that those would most properly be the *American Bar Association Standards for the Defense Function*. Some of the United States Courts of Appeal for the various circuits have either adopted, or moved in the direction of adopting, these Standards: *United States v. DeCoster*, 487 F. 2d 1197, 1203 (D.C. Cir. 1973); *Wolfs v. Britton*, 509 F. 2d 304, 310 (8th Cir. 1975).

One of the most comprehensive opinions on the subject is found in *McQueen v. Swenson*, 498 F. 2d 207 (8th Cir. 1974). Other relevant authority on the competency issue is found in *Coles v. Peyton*, 389 F. 2d 224 (4th Cir. 1968), cert. den. 393 U.S. 849 (1968); *Moore v. United States*, 432 F. 2d 730 (3rd Cir. 1970); *Beasley v. United States*, 491 F. 2d 687 (6th Cir. 1974); *United States v. Hammond*, 425 F. 2d 597 (D.C. Cir. 1970), and *Johnson v. United States*, 328 F. 2d 605 (5th Cir. 1964).

The competency issue transcends the bounds of this case. It seems incredible that in the twentieth century, in many courts, Sixth Amendment rights are satisfied if the process rises barely above the sham or mockery of justice standard. It is also fascinating that such high standards have been raised for the judiciary, but there is so little interest in doing the same for the lawyer. Petitioner invites the Court's attention to Appendix B, *infra*, for an uncontroverted recitation of the kind of competence demonstrated by his counsel below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted.

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July 21, 1977

APPENDIX

APPENDIX A

Opinion of the Court of Appeals

In the United States Court of Appeals
for the Seventh Circuit

Nos. 76-1262 and 77-1472

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WAYNE EARL ELLISON,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Evansville Division.
No. EV 75-17-CR—**S. Hugh Dillin,** *Judge.*

ARGUED OCTOBER 18, 1976—DECIDED JUNE 29, 1977

Before CLARK, *Associate Justice,** CASTLE, *Senior Circuit Judge,* and BAUER, *Circuit Judge.*

BAUER, *Circuit Judge.* Defendant-appellant Ellison was tried by a jury on a multiple-count indictment charging him with

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* The Hon. Tom C. Clark, Associate Justice of the United States Supreme Court (Retired) sat by designation. This opinion was approved by Mr. Justice Clark prior to his death.

conspiracy to distribute controlled substances and with several counts of distributing controlled substances in violation of 21 U.S.C. § 841(a)(1). The evidence presented at trial showed that Ellison, a pharmacist, conspired with a physician[1] to distribute controlled substances without a legitimate medical purpose. Upon conviction, Ellison received an 18-month prison sentence on the conspiracy count and 18-month concurrent sentences on the substantive counts. After perfecting an appeal from his convictions, Ellison filed a motion for a new trial in the district court, which was denied for lack of jurisdiction. Ellison then filed a separate notice of appeal from the district court's post-trial ruling, and we ordered that appeal docketed and consolidated with the appeal he brought from his convictions.

Ellison proposes several grounds for overturning his convictions and urges us to reverse the district court's order denying his motion for a new trial. He contends (1) that extrajudicial admissions used against him at trial were made involuntarily because induced by promises of leniency; (2) that he was denied the effective assistance of counsel at trial (3); that the district court erred in refusing to admit evidence he offered to rebut the Government's proof of an overt act in furtherance of the conspiracy; and (4) that he was sentenced on counts under which he was not convicted.

We affirm his convictions and the district court's post-trial ruling for the reasons noted below.

I

Ellison's principal claim is that the district court erred in denying his pretrial motion to suppress allegedly involuntary

[1] The physician was tried and convicted with Ellison, but died before his appeal was decided. We entered an order dismissing his appeal as moot, vacating his conviction and remanding the case for dismissal of the indictment. *United States v. Moehlenkamp*, No. 76-1243 (7th Cir. June 27, 1977).

statements made to agents of the Federal Drug Administration, the Indiana State Police and the Evansville Police Department. Ellison contends that he was told by federal drug agents auditing his pharmaceutical records that "You have a clean bill of health. We are satisfied with the audit." Construing that statement as an implied promise of immunity from prosecution, Ellison says that it was only because of that promise that he agreed to waive his *Miranda* rights and cooperate in the state and federal investigations that led to his arrest, trial and convictions. He reasons from this assertion that the statements he made to various federal and state agents were involuntary because, had he known he was a target of the investigations, he would not have waived his right to remain silent and made the incriminating admissions later used against him at trial.

The principal flaw in Ellison's argument is that it proceeds from the erroneous premise that he was told by federal drug agents that he had a "clean bill of health." After hearing the evidence presented at the pretrial suppression hearing, the district court expressly found that the agents never told Ellison that he had a clean bill of health or that he was not a subject of their investigation. Crediting the agents' testimony, the district court determined that the agents in fact told Ellison that they were turning the results of their investigation over to the United States Attorney. Ellison does not challenge the district court's findings as clearly erroneous, and we do not believe that they are. In view thereof, we deem Ellison's implied-promise-of-immunity argument patently frivolous and hold that his extrajudicial admissions were properly used against him at trial.

II

Ellison next contends that he was denied the effective assistance of counsel at trial. Recognizing that the facts underlying his claim are not part of the trial record submitted to us on

direct appeal from his convictions and correctly anticipating that we would not overturn his convictions on the basis of matters outside the trial record, Ellison filed a motion for a new trial in the district court after perfecting an appeal from his convictions and attached to the motion an affidavit setting forth the facts upon which he bases his incompetency-of-counsel claim. The facts alleged therein suggest that Ellison's privately retained counsel was inadequately prepared for trial and made numerous tactical errors in the course of the trial, such as refusing to take issue with allegedly inaccurate statements made at trial and declining to call various witnesses at the defendant's behest, including Ellison himself. Finding that the underlying facts were known to Ellison at the time of trial and thus could not be "newly discovered" evidence, the district court denied his motion for lack of jurisdiction because it was untimely filed under Rule 33 of the Federal Rules of Criminal Procedure. Ellison filed a separate notice of appeal from the district court's order so that he might obtain review of the ruling in concert with his direct appeal from his convictions.

As Ellison anticipated, we decline to pass upon the merits of his ineffective-assistance-of-counsel claim on direct appeal from his convictions, for the facts upon which his claim is founded are not part of the trial record. We also affirm the district court's denial of his motion for a new trial for the reasons given below.

We address at the outset certain threshold issues posed by Ellison's appeal from the district court's order denying his motion for a new trial. Because Ellison filed a separate notice of appeal from the district court's order, we believe we have jurisdiction under 28 U.S.C. § 1291 to review the district court's ruling in concert with Ellison's direct appeal from his conviction. *Richardson v. United States*, 360 F.2d 366, 369 (5th Cir. 1966); see *United States v. Hayes*, 454 F.2d 274, 275 (9th

Cir. 1972). We note, however, that there is some question as to whether the district court itself had jurisdiction to entertain a motion for a new trial while an appeal from Ellison's conviction was pending in this Court. One Circuit appears to take the view that the filing of a notice of appeal from a criminal conviction ousts the district court of jurisdiction to consider any post-trial motions related to a case pending on appeal. *United States v. Johnson*, 487 F.2d 1318, 1321 (5th Cir.), *cert. denied*, 419 U.S. 825 (1974). Other Circuits, however, take the position that Rule 33, in barring district courts from granting motions for a new trial while appeals are pending, implicitly authorizes the district courts to hear and deny such post appeal motions. *United States v. Hayes, supra* at 275; *Rakes v. United States*, 163 F.2d 771, 772-73 (4th Cir. 1947), *cert. denied*, 335 U.S. 826 (1948). We believe it necessary to resolve this issue here, for, unless the district court had the power to entertain Ellison's motion for a new trial while an appeal from his convictions was pending, there is no reason to reach the question of whether his motion was based on "newly discovered" evidence and thus timely filed under Rule 33.

Ordinarily, the filing of a timely notice of appeal from a final judgment ousts the district court of jurisdiction to proceed further in the case except in aid of the appeal. *Elgen Mfg. Co. v. Ventfabrics, Inc.*, 314 F.2d 440, 444 (7th Cir. 1963). However, this general rule is subject to the exception that a district court may consider such matters as authorized by statute or rule. *Id.* Pursuant to that exception, we have held that district courts may reach the merits of motions filed under Rule 60(b) of the Federal Rules of Civil Procedure while an appeal is pending, including motions for a new trial based on allegations of newly discovered evidence. E.g., *Washington v. Board of Education*, 498 F.2d 11, 15-16 (7th Cir. 1974); *Binks Mfg. Co. v. Ransburg Electro-Coating Corp.*, 281 F.2d 252, 260-61 (7th Cir. 1960), *cert. dismissed*, 366 U.S. 211 (1961). Under the ap-

proved procedure, the district court may either deny the motion on the merits without seeking leave to do so from this Court or, if disposed to grant the motion, certify its determination so that a motion for remand of the pending appeal may be favorably entertained in the court of appeals. We believe this procedure adopted for civil cases should be extended to criminal cases as well and that Rule 33 of the Federal Rules of Criminal Procedure supports such an extension.

To be sure, Rule 33 expressly prohibits district courts from granting motions for a new trial while appeals from related convictions are pending in the courts of appeals. However, there is nothing in the Rule itself or in the Advisory Committee Notes appended thereto that prevents the district courts from entertaining such motions while the related appeals are pending. Indeed, it is reasonable to assume that the Rule was intended to authorize the district courts to do so, for otherwise the prohibitory language of the Rule would be only a superfluous declaration of pre-existing law. Moreover, construing the Rule to permit consideration of motions for a new trial on the merits while appeals are pending permits expeditious dispositions of such motions and obviates the need for us to spend time reviewing requests for the remand of appeals for consideration of post-trial motions that often prove to be frivolous. Accordingly, we adopt the view of other courts and commentators that, by negative implication, Rule 33 authorizes district courts to entertain motions for a new trial while appeals from the related convictions are pending in the court of appeals. *United States v. Hayes, supra* at 275; *Richardson v. United States*, 360 F.2d 366, 368-69 (5th Cir. 1966); *Rakes v. United States, supra* at 772-73; 8A *Moore's Federal Practice* ¶ 33.03[2], at 33-17; 2 Wright & Miller, *Federal Practice and Procedure*, § 557, at 534-35. This assumes, of course, that the motions are otherwise timely filed under Rule 33, *i.e.*, within seven days of verdict or within two years of judgment if based on newly discovered evidence. Should the

district court be disposed to deny the motion on the merits, the court may do so without seeking leave from the court of appeals. The defendant may then take a separate appeal from the district court's ruling and move to have it consolidated with the direct appeal previously taken from his conviction. If the motion has merit, the district court should certify that it would grant the motion on remand, so that a petition to remand the pending appeal may be favorably entertained in the court of appeals.

Having determined that Ellison's pending appeal from his convictions raised no jurisdictional barrier to consideration of his motion for a new trial, we turn to the question of whether the district court correctly ruled that his motion was untimely filed because it was not based on "newly discovered" evidence within the meaning of Rule 33. Ellison does not dispute the district court's finding that the facts underlying his ineffective-assistance-of-counsel claim were known to him at the time of trial. He argues, however, that his motion alleging the ineffective assistance of counsel still should have been treated as one in the nature of "newly discovered" evidence for otherwise defendants dissatisfied with their trial counsel's performance will be unable to bring such claims by way of motions for a new trial within the time limitations imposed by Rule 33. He urges us to follow *United States v. Brown*, 476 F.2d 933, 935 (D.C. Cir. 1973), which states that "evidence of the ineffectiveness of trial counsel . . . brought to the attention of the court for the first time in support of [a motion for a new trial] is 'newly discovered' for . . . purposes of Rule 33."

We recognize that defendants unhappy with the representation they received at trial, particularly those unable to retain counsel privately as did Ellison, often will be unable to obtain a new attorney in sufficient time to permit them either to file a motion for a new trial within the seven days of verdict required by Rule 33, or else to seek an extension of time for the filing of such a

post-trial motion as permitted by the Rule. The practical difficulties faced by defendants seeking to raise ineffective-assistance-of-counsel claims by way of motions for a new trial, however, do not give us cause to corrupt the clear language of Rule 33. Newly discovered evidence must be newly discovered. Where, as here, the facts alleged in support of a motion for a new trial were within the defendant's knowledge at the time of trial, such a motion may not be treated as one in the nature of newly discovered evidence for purposes of Rule 33. *United States v. Demopoulos*, 506 F.2d 1171, 1180-81 (7th Cir. 1974), *cert. denied*, 420 U.S. 991 (1975). Accordingly, the district court did not err in determining that Ellison's motion was not one based on "newly discovered" evidence and therefore dismissing it for want of jurisdiction because it was untimely filed.

We acknowledge that our holding is in apparent conflict with *Brown* and other decisions of the District of Columbia Circuit, which support the view that a defendant may raise an ineffective-assistance-of-counsel claim and support it with evidence *dehors* the trial record by way of a motion for a new trial treated as one based on "newly discovered" evidence even if the facts underlying that claim were known to the defendant at the time of trial.* 476 F.2d 935 n.11; *United States v. Thompson*, 475 F.2d 931, 932 & n.4 (D.C. Cir. 1973); *United States v. Smallwood*, 473 F.2d 98, 104 (D.C. Cir. 1972) (Bazelon, J., concurring). That Circuit's relaxation of normative notions of "newly discovered" evidence,[2] however, apparently is prompted

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* In view of what is arguably a conflict between our views and those of the District of Columbia Circuit in the *Brown* case, the portions of this opinion relevant to our holding have been circulated among all judges of this Court in regular active service. No judge favored a rehearing en banc with respect to that holding.

[2] To warrant granting a motion for a new trial based on newly discovered evidence, it must be shown (1) that the evidence was discovered since the trial; (2) that the evidence could not have been discovered sooner with the exercise of due diligence; (3) that the evidence is not merely cumulative or impeaching; (4) that the evidence is so material that it probably would produce a different verdict. *United States v. Curran*, 465 F.2d 260, 264 (7th Cir. 1972).

by its view that a "more powerful" showing of counsel's inadequacy is necessary to sustain a collateral attack on a conviction than would be necessary to obtain a favorable ruling on a motion for a new trial. *United States v. Thompson, supra* at 932 n.3, citing *Bruce v. United States*, 379 F.2d 113, 117 (D.C. Cir. 1967). We do not share that view.[3] The constitutional standards governing adjudication of ineffective-assistance-of-counsel claims do not vary, in this Circuit at least, with the nature of the proceedings in which such claims are raised. When a criminal defendant has shown that he was not provided trial counsel who met "minimum standards of professional representation," the fact that the showing was made in a proceeding collaterally attacking a criminal conviction has not deterred us from enforcing the provisions of the Sixth Amendment.[4] E.g., *United States* ex rel. *Spencer v. Warden*, 545 F.2d 21 (7th Cir. 1976); *United*

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[3] To be sure, a collateral attack proceeding brings into play the "strong interest in preserving the finality of judgments," *Henderson v. Kibbe*, 45 U.S.L.W. 4457, 4460 n. 13 (U.S. May 16, 1977) (No. 75-1906), and very practical considerations may motivate courts to mandate that a "heavier" evidentiary burden be borne on collateral attack than on direct appeal. See *Garton v. Swenson*, 497 F.2d 1137, 1139-40 n.4 (8th Cir. 1974). However, the same finality interest and practical considerations come into play where, as here, a motion for a new trial based on newly discovered evidence is filed more than seven days after verdict. *Brodie v. United States*, 295 F.2d 157, 159-60 (D.C. Cir. 1961) (Burger, J.); see 2 Wright & Miller, *supra* at 515-16.

[4] We note that the harsh "farce or mockery" standard for reviewing ineffective-assistance-of-counsel claims prevailed in the District of Columbia Circuit at the time *Brown, Thompson* and *Bruce* were decided. That may explain, in part, that Circuit's aversion to remitting defendants raising such claims to post-conviction remedies. See *United States v. Smallwood, supra* at 103. Yet, though the Circuit has liberalized its ineffective-assistance-of-counsel standard, it appears still to adhere to the view that a different standard applies on direct appeal than on collateral attack. See *United States v. De Costa*, 487 F.2d 1197, 1201-02 (D.C. Cir. 1973).

States ex rel. *Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975). Unlike the District of Columbia Circuit, we have no reason to doubt the adequacy of post-conviction remedies for petitioners such as Ellison who urge vacation of their convictions by reason of constitutionally deficient trial representation that could not be argued on direct appeal because based on evidence outside the trial record.[5] Ellison and similarly situated defendants can raise their Sixth Amendment claims and support them with evidence outside the trial record in post-conviction proceedings pursuant to 28 U.S.C. § 2255 or, if necessary, by way of an application for a writ of coram nobis. *United States v. Morgan*, 346 U.S. 502 (1954).

Accordingly, without prejudice to Ellison's right to raise his ineffective-assistance-of-counsel claim in a post-conviction proceeding under 28 U.S.C. § 2255, we affirm the district court's dismissal of his motion for a new trial for want of jurisdiction and decline to pass upon the merits of his Sixth Amendment claim on direct appeal from his convictions because it speaks to matters outside the trial record.

III

Ellison next contends that the district court erred in excluding evidence offered by him to rebut the Government's proof of an overt act in furtherance of the conspiracy. The overt act charged was the installation of a private telephone line between Ellison's pharmacy and his codefendant's office. To prove the overt act, the Government introduced telephone company rec-

[5] The suggestion has been made that miscarriages of justice correctable on appeal though not rising to the level of constitutional error could not be reached on collateral attack. *United States v. Agurs*, 520 F.2d 82, 83-84 (D.C. Cir. 1975) (Leventhal, J., concurring). See, however, *Davis v. United States*, 417 U.S. 333, 346 (1974); *Gates v. United States*, 515 F.2d 73, 76-77 (7th Cir. 1975); *Kyle v. United States*, 297 F.2d 507, 511 n.1 (2d Cir. 1961), *cert. denied*, 377 U.S. 909 (1964).

ords and elicited testimony from a company official showing the existence of the direct private line installed at Ellison's request. On cross-examination of the witness, Ellison's counsel sought to introduce the telephone company records of four other pharmacies in the Evansville area for the purpose of showing that it was a "common practice" to have such direct lines installed between pharmacies and physicians' offices. The Government objected to the admissibility of the records on the ground of relevancy. Sustaining the Government's objection, the trial judge informed defense counsel that he would permit Ellison to put on a properly qualified witness to testify to the existence of the general practice or custom at a later time, but would not admit the records of specific pharmacies on cross-examination to rebut the Government's proof of the overt act charged. Ellison, claiming that his offer of proof would have negated the inference of conspiracy created by the Government's proof that there was a private telephone line between his pharmacy and his codefendant's office, assigns the district court's ruling as error.

We believe that the question of relevancy of the records Ellison sought to introduce would be a close one, had he offered the records during his case-in-chief rather than on cross-examination. The Government did elicit testimony from other witnesses for the purpose of showing that the existence of this private line was to be viewed with suspicion and as some evidence that a conspiracy existed. Accordingly, Ellison would have been entitled to show during his case-in-chief that the installation of a private line between a pharmacy and a physician's office was not as uncommon as the Government would have the jury believe. But, even if we assume that the records would have been relevant rebuttal evidence if offered during the presentation of Ellison's own case, we need not thereby conclude that the district court erred in excluding the evidence at the time it was offered.

Cross-examination should be limited to the scope of matters brought out on direct, and trial judges are vested with broad dis-

cretion to determine whether questions posed or evidence offered on cross-examination is relevant to the subject matter presented on direct. Fed. R. Evid. 611(b); *United States v. Isaacs*, 493 F. 2d 1124, 1162 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *United States v. Cole*, 449 F.2d 194, 199 (8th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972). At the time Ellison offered the records into evidence, the witness under examination was an employee of the telephone company through whom the Government proved only that Ellison had installed a private telephone line to his codefendant's office. In establishing the existence of the private line, the Government simply was proving up an overt act alleged in the indictment and not putting at issue the frequency of the practice of installing such private lines between pharmacies and physicians' offices. On cross-examination Ellison attempted to put the custom in the pharmaceutical trade at issue by showing that four other Evansville pharmacies had installed private lines to the offices of physicians. This proof, however, did not in any manner rebut the Government's proof of the overt act charged or any testimony of the witness under cross-examination.[6] Accordingly, we do not believe the district court erred in rejecting Ellison's offer of proof. The court's action can reasonably be viewed as an exercise of its discretion to control the order of proof, for the court did invite Ellison to later put on witnesses or other evidence to show that installation of private lines was a "common practice" of Evansville pharmacies.

IV

Finally, Ellison claims that he was sentenced under counts for which he was not convicted. He notes that, although the jury convicted him of counts 1 and 24 through 30, he was sen-

[6] The records would have been relevant, of course, had they been offered during cross-examination of the other witnesses who testified, in effect, that it was unusual to have a direct private line installed between a pharmacy and a physician's office.

tenced under counts 1, 60, 63, 65, 67, 68, 74 and 78 of the indictment. Ellison concedes that the only reason for the variance in the numbering of the counts submitted to the jury and those alleged in the indictment is that the district court, *with the consent of the parties*, renumbered the counts submitted to the jury after the Government had dismissed many of the 80 counts initially charged in the indictment. Nevertheless, Ellison claims that the district court committed plain error in renumbering the counts.

We believe that Ellison's argument is patently frivolous and decline to hold that the trial judge committed plain error by renumbering the counts before submitting the case to the jury. Moreover, we are convinced that any error Ellison has alleged would necessarily be harmless beyond a reasonable doubt for no prejudice could have resulted from the procedure: apart from the different numbering, the counts on which the jury convicted Ellison were identical to the counts under which he was sentenced.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Judgment of the Court of Appeals

(Opinion by Judge Bauer)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 29, 1977

Before

Hon. Tom C. Clark, Associate Justice (Retired)*

Hon. Latham Castle, Senior Circuit Judge

Hon. William J. Bauer, Circuit Judge

United States of America, Plaintiff-Appellee.	Appeals from the United States District Court for the Southern District of Indiana, Evansville Division
No. 76-1262, 77-1472 vs.	
Wayne Earl Ellison, Defendant-Appellant.	No. EV 75-17-CR

These cases came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Evansville Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in these causes appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this court filed this date.

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* The Hon. Tom C. Clark, Associate Justice of the United States Supreme Court (Retired), sat by designation. This opinion was approved by Mr. Justice Clark prior to his death.

APPENDIX B

Motion of Petitioner for New Trial With Supporting Affidavit

"MOTION OF DEFENDANT WAYNE EARL ELLISON FOR NEW TRIAL

The defendant, Wayne Earl Ellison, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, moves the Court for a new trial herein, for this reason:

1. It is required in the interest of justice in that, prior hereto, this defendant was deprived of counsel with reasonable competency, in violation of his Federal Constitutional Sixth Amendment rights.

2. That this reason is in the nature of newly discovered evidence, and is supported by the attached affidavit."

* * *

"AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

State of Indiana
County of Vanderburgh } ss.

WAYNE E. ELLISON, being first duly sworn, upon his oath deposes and says:

After the within charges were brought against me in June, 1975, I sought counsel to represent me in defense of these charges. Certain associates of mine, including Joe Reine of the Indiana State Police, persuaded me to contact Ford Lacy, stating that the law firm of which Mr. Lacy was a member, was practically the only local law firm that could be trusted.

In July, 1975, I contacted Mr. Lacy in order to discuss with him my case. At that time, Mr. Lacy informed me that his firm would be unable to represent me, but that he knew of an attorney, James Neel, of Indianapolis, Indiana, who would be excellent for this case.

Mr. Lacy said that James Neel would not accept the case unless he thought he could win it. Mr. Lacy thought that I was guilty of gross negligence but not of any felony. Mr. Lacy also said that James Neel personally knew Sarah Barker, Assistant United States Attorney, Joe Annakin, United States Magistrate and F. Lee Bailey, a nationally famous attorney.

On July 21, 1975, I called and made an appointment with Jim Neel. The following day I traveled to Indianapolis to visit Mr. Neel at his office. At this time, Mr. Neel told me that he could win this case, and that he would never accept the case if he did not feel that he could win. He stated to me that Sarah Barker, Assistant U.S. Attorney, in charge of the case, had been a friend of his since childhood, and that his knowledge of her courtroom tactics would help him. Mr. Neel also said that Joe Annakin, a U.S. Magistrate, was a member of Mr. Lacy's firm and would be helpful in this case. Finally, Mr. Neel stated that he was associated with F. Lee Bailey, and that Bailey would be at Mr. Neel's disposal during this case. On this day, Mr. Neel accepted my case for a fee of $25,000.00, and I wrote him a check for $12,500.00.

Mr. Neel informed me that Joe Zeunik, an ex-state policeman and medical investigator, would be in charge of investigative work for my case.

On August 27, 1975, I met with Neel and Zeunik at the Executive Inn, Evansville, Indiana, as this was the date of my arraignment. Trial was set for October 28, 1975. On this date I talked to Mr. Neel for two and one-half hours, although a majority of this time our discussion was on a social, rather

than a professional basis. Mr. Neel returned to Indianapolis that day, after collecting a check for $1,000.00.

Mr. Neel had the original trial date of October 28, 1975 postponed until February 2, 1976. Mr. Neel's reasoning for this was the Judge Nolan would be on the bench at the October date, but Judge Dillin would be the judge at the February 2, 1976 date. Mr. Neel stated that Judge Nolan would be the least favorable judge for this case. In January, 1976, just prior to the trial, Mr. Neel said that Judge Dillin was the worse possible judge that I could face. When I reminded him that he said on an earlier occasion that Judge Dillin was preferable to Judge Nolan, Mr. Neel denied that he had ever made such a statement.

After Mr. Neel returned to Indianapolis on August 27, 1975, Mr. Zeunik remained for two additional days, conducting his investigation. I spent approximately six hours with Mr. Zeunik during this time, but more of this time was spent entertaining him, at my expense.

On September 8, 1975, I flew to Indianapolis to meet with Mr. Neel, at his request. At this time, Mr. Neel demanded that I enter a negotiated plea. I told Mr. Neel that I was not interested in plea bargaining because I knew that I was not guilty, and because I felt I could not possibly help the government's case against Dr. Mohlenkamp by my testimony.

The following day, September 9, 1975, Mr. Neel called me and said that he was changing his advice, and that I should not plea bargain. He never did say why he suggested that I enter a negotiated plea in the first place.

On October 8, 1975, Mr. Neel returned to Evansville, and I met him and Mr. Zeunik at the Executive Inn. Neel spent only two hours with me and returned to Indianapolis. Mr. Zeunik stayed through October 9, 1975, and I spent approxi-

mately four hours with him. No new facts concerning the case were disclosed to me at this time, and the only significant event seemed to be that I wrote another check for $2,500.00.

Mr. Zeunik returned to Evansville on December 11, 1975, although no new developments had occurred. He met with me for about two hours, and his entire conversation seemed to be centered around comforting me that the case was coming along fine. He stated that he and Mr. Neel would practically spend the entire month of January in Evansville preparing my case. After collecting another check from me, he returned to Indianapolis.

On January 13, 1976, I visited Mr. Neel in Indianapolis, at his request. At this time, Mr. Neel demanded that I enter a negotiated plea. I was very disheartened. From the time of July, 1975 to that point in time I expected that Mr. Neel was preparing my case for acquittal through trial, and he knew that I was not interested in plea bargaining.

At this point in time, which was only 20 days before my trial, I did not feel that I was prepared for my trial, as I did not even know the details of the specific counts which the government was charging against me. There were originally 24 counts charged against me but only 8 counts were eventually charged against me in the trial. I only found this out by reading the newspaper, as Mr. Neel never did inform me. One count charged conspiracy, while the others were charges of dispensing drugs without a legitimate medical purpose. I never knew these details until we were in court.

As I understand it, to convict me on the conspiracy charge, the government had to prove overt acts. Mr. Neel refused to marshal available evidence against proof of these overt acts.

Mr. Neel did not investigate the details of the seven counts of dispensing drugs with legitimate medical reasons. I had to

explain to him, *on the day of the trial* the validity of these prescriptions; however, Mr. Neel refused to use this information:

1. Four of these counts were for prescriptions to Pat Stewart, a serious cronic colon disorder patient. Pat Stewart is continuing, even today, on the same medication that Dr. Moehlenkamp was prescribing for her, Percodan.

2. One count represented a prescription for one William Lockett, who was seriously ill, and subsequently died.

3. Two counts represented prescriptions filled by Dan Laib.

I could have supplied witnesses that would have testified to the above facts. Those witnesses who would have been willing to testify included:

a. Dee Stewart, Pat Stewart's husband, in her behalf,

b. Frances Utley,

c. Verl Opperman,

d. Charles Mayes,

e. Charlotte Dietz.

During the times of the visits by Mr. Neel and Mr. Zeunik, such matters were never discussed. In addition to these visits I made numerous phone calls to Mr. Neel pleading with him to get together with me for serious preparation of my case.

Following is a list of times I called Mr. Neel:

1. July 21, 1975
2. August 1, 1975
3. August 7, 1975
4. August 8, 1975
5. August 12, 1975
6. August 12, 1975
13. January 4, 1976
14. January 15, 1976
15. January 19, 1976
16. January 23, 1976
17. January 24, 1976
18. January 26, 1976

7. August 22, 1975
8. September 4, 1975
9. September 5, 1975
10. September 5, 1975
11. September 8, 1975
12. January 2, 1976
19. February 11, 1976
20. February 12, 1976
21. February 24, 1976
22. March 3, 1976
23. March 3, 1976

The only response that I got from my phone calls was that everything was going fine, and that I need not worry. I have my phone bills to substantiate these phone calls.

Mr. Neel never did discuss prosecution witnesses in preparation for my trial, stating that he did not even know who they were until the third day of my five-day trial. As I understand this situation, Mr. Neel could have found out the prosecution witnesses by checking with the Marshal's office to see the records of the subpoenaes issued.

In addition to the witnesses that I could supply in my defense, to repudiate the actual counts, as already listed, I informed Mr. Neel that I could provide a list of people who would testify in my behalf, as either character witnesses, professional people (doctors and pharmacists) whose understanding of the facts of the case would be helpful to me, or witnesses who could substantiate other significant facts. The list was as follows:

	Name	Address	Phone
1.	Don Cobb, M.D.	1401 Greenriver Rd., Evansville, Indiana	479-8726
2.	Don Godwin, M.D.	3700 Bellemeade Evansville, Indiana	477-5518
3.	Bob Salat	New Harmony Rd., Boonville, Indiana	867-5042
4.	Lois Kenoyer	910 Stonebridge Evansville, Indiana	424-1212
5.	Pat DeVillez	5814 N. Kerth Evansville, Indiana	424-0837
6.	Clara Minning	1301 Woodbine Lane Evansville, Indiana	422-9745

	Name	Address	Phone
7.	L. D. Abernathy	507 Pfeiffer Rd., Evansville, Indiana	422-5716
8.	Betty Kemper	8005 Pine Creek, Evansville, Indiana	867-2592
9.	Pat Greathouse	3016 Tremont, Evansville, Indiana	422-5744
10.	Owen Slaughter, M.D.	3700 Bellemeade Evansville, Indiana	477-1525
11.	Marjorie Storey	301 Inwood Dr., Evansville, Indiana	424-8745
12.	Bob VanHoosier	Newburgh, Indiana	
13.	Rev. Theodore Temple	St. Anthony's Catholic Church Evansville, Indiana	423-5209
14.	Joe Reine	1311 Crossgate, Evansville, Indiana	423-5982
15.	Wendy Opal	State Inspection Indiana Board Pharmacy Evansville, Indiana	
16.	Bob Bloss	Bob's Pharmacy Chandler, Indiana	
17.	Jim Carroll	Jim's Pharmacy Mt. Vernon, Indiana	
18.	Eugenia Gordon	Hooks Drug, Princeton, Indiana	
19.	John Price	Super X Drug, 630 Sonntag Ave., Evansville, Indiana	
20.	Riley Lilly	Citizens National Bank, Evansville, Indiana	464-3211
21.	Henry Mominee	3990 Woodcastle Evansville, Indiana	424-4965
22.	Bob Levi	1016 S. Weinbach, Evansville, Indiana	477-8941
23.	Dorothy Kneer	2604 Lincoln Avenue, Evansville, Indiana	477-7400
24.	Marsha Anderson	407 Campground Road, Evansville, Indiana	425-2069
25.	Lowe Anzel	5516 Stringtown Rd., Evansville, Indiana	425-6648
26.	Marilyn DolliGatti	409 Fairway, Evansville, Indiana	424-0351
27.	Victor Huggins, M.D.	611 Harriet, Evansville, Indiana	423-6687

Mr. Neel was not particularly interested in this list, stating that he did not know these people, and besides, everyone knew Wayne Ellison.

At no time would Mr. Neel discuss with me a summary of his investigation, although $10,000.00 of the $25,000.00 fee was supposed to cover the investigation.

After my visit with Mr. Neel on January 13, 1976, I was extremely uncomfortable with my position of seemingly having no defense. On January 14 and 15, 1976, I attempted to get in touch with Mr. Neel, but his office informed me that he was not in. On January 19, 1976, I called Mr. Neel's office, and again he was not in. I instructed his office to send me:

1. A list of witnesses—defense and prosecution
2. Summary of investigation
3. Copies of anything and everything filed
4. List of questions attorney wants to ask me
5. List of questions or items attorney wants me to help with
6. Letter of prepared recommendations and negotiations of plea bargaining

On January 23, 1976 and January 24, 1976, I again called Mr. Neel's office but he did not receive calls on either day. On January 26, 1976, I again called Mr. Neel's office, and since he was not in, I talked to Mr. Stephens. Mr. Stephens said that it would be impossible to send me the information I requested because of the bulk of material.

On January 28, 1976 Mr. Neel called me. After we had exchanged some heated words, Mr. Neel asked if I wanted to fire him. I said yes if Mr. Neel would refund most of the fee paid to him. He said no. Finally, he said to let him handle the

case, that he knew what he was doing. Mr. Neel reassured me that he was prepared for the trial.

I demanded that Mr. Neel get the trial postponed. Mr. Neel replied that he had requested to Judge Dillin that he needed more time to prepare for the trial because he had spent much time helping F. Lee Bailey in the Patty Hearst trial, but Judge Dillin refused.

Ford Lacy later told me that Mr. Neel had spent nearly three months in late 1975 and early 1976, in assistance with the Patty Hearst case in California, and that during this time Mr. Neel virtually ignored his own practice.

At 5:00 P.M. on February 1, 1976, Mr. Neel arrived in Evansville, exactly 16 hours before my trial began. That evening Mr. Neel and I got together to discuss the case. This short time was a far cry from the anticipated intense preparation that Joe Zeunik said would occur during the entire month of January. During the evening of February 1, 1976, Mr. Neel wanted to call all of the doctors and pharmacists on my list of witnesses, so that he could interview them. I was angry to be put in this embarrassing position at such late notice. I was able to arrange interviews with three pharmacists; Bob Bloss, Jim Carroll, and Eugenia Gordon, but that was all that could be arranged on such a late notice.

The trial began on Monday, February 2, 1976. During the trial there were many things said in the government's case that were either exaggerated or simply wrong. Even though I pointed these things out to Mr. Neel, he chose not to contest them. Most often his response to me was that these things were not important and that he would take care of them later. Later never came. Finally, little or no evidence and no witnesses were presented in my behalf. Mr. Neel even refused to allow me to testify in my behalf.

One of the prosecution's major points in attempting to prove a conspiracy, was to illustrate the significance of Dr. Moehlenkamp's prescriptions to my business. One prosecution witness, Millie Blankenship Cromwell, stated that 90% of my prescriptions came from Dr. Moehlenkamp. Another witness, Dan Laib, stated that 40% to 50% of my business came from Dr. Moehlenkamp. Drug Enforcement Agency officials estimated that between 55% and 95% of my business came from Moehlenkamp. The prosecution also pointed out the large number of prescriptions that came from Dr. Moehlenkamp, and the fact that Dr. Moehlenkamp actually recommended my pharmacy to some of his patients.

In my defense, the following facts could have been disclosed:

1. Dr. Moehlenkamp's prescriptions represented less than 25% of my prescription business, based on my prescription records.

2. If Dr. Moehlenkamp's prescriptions were excluded, Wayne's Pharmacy still filled more prescriptions than any other pharmacy in the state. A large volume of the business came from:

a. Five nursing homes.

b. Industrial accounts, such as Whirlpool, International Steel, General Tire, Igleharts, Indian Archery, Hahn, Inc., and Credit Thrift.

When these facts are considered, Dr. Moehlenkamp's prescriptions are relatively not as significant:

Dr. Moehlenkamp's were mainly of lower economic status, and that Dr. Moehlenkamp recommended my pharmacy because Wayne's Pharmacy has the lowest prices of any pharmacy in the area.

Mr. Neel did not present any of these facts during the trial.

One of the prosecution's witnesses, Mr. Favor, was brought from Florida to testify that he had numerous illegitimate prescriptions filled at my pharmacy, and that he became a friend of mine. In fact I had never met or seen this man. I pointed this out to Mr. Neel during the trial, but he said not to worry about it, and Mr. Neel never did disclose this.

Probably the most significant prosecution witness was Dan Laib, pharmacist-lawyer, who formerly was my employee, and was a co-defendant in this case. Mr. Laib perjured himself on at least two occasions during the trial. Mr. Laib testified that he did not fill any of the vacation prescriptions. This could have been proved to be false by use of my employee records which showed that Laib was the only pharmacist on duty on Sundays, and that some of these prescriptions were filled on Sundays. Mr. Laib also testified that I gave Dr. Mohlenkamp a brown paper bag full of money, on Mohlenkamp's return from his vacation. In fact, Laib actually took care of this, and he gave the money to Mohlenkamp. I pleaded with Mr. Neel to bring this out during the trial, but he would not.

During the trial, Mr. Gray, a Drug Enforcement Agent, stated that Thomas Matusz received 35,000 units of a drug named "Parest" from my pharmacy during a ten month period. In truth less than 35,000 units were even purchased by my pharmacy during this period of time, and many prescriptions for this drug are used in the nursing homes that I service. I can prove this is an exaggeration from my records of purchases and from my records of prescriptions filled for Matusz. I also pointed this out to Mr. Neel during the trial, but he again said not to worry about it, that he would take care of it later.

During the trial the prosecution based much of its case on the investigation performed by the United States Drug Enforcement Agency. Mr. Neel attempted to have the testimony of D.E.A. officials suppressed because of promises that they had

made to me. This motion was denied by Judge Dillin because two D.E.A. agents said that no promises had been made. However, the promises were made by another agent, and although I told Mr. Neel this, he did not have Mr. Irving, the agent who made these promises, called as a witness. Mr. Neel also refused to disclose that I had completely cooperated with the D.E.A. in its investigation, and that I had even told Mr. Gray, of the D.E.A., in March of 1975, that I would refuse to fill Dr. Moehlenkamp's prescriptions in order to comply with their wishes.

The final major point in my trial was that Mr. Neel provided no defense testimony. Even though I provided him with a list of witnesses that he could call, and had prepared testimony on my own behalf, he did not feel that it was necessary to present a defense.

On Sunday night, just prior to my trial, I took some subpoenas to Mr. Claude Bates, an attorney which handled a collection suit against Dr. Moehlenkamp. Mr. Bates told me to be sure to have Mr. Neel to have me to testify. Mr. Bates also said that Dee Stewart would testify in my behalf in regard to the vacation prescriptions.

Later that same evening, I met with Mr. Neel, and at that time I gave him my version of the facts in this case, as recorded on tape. Mr. Neal commented in a very arrogant manner that the way I presented facts on tape and the way I handled a statement made in Mr. Bates office, Mrs. Barker would crucify me if I took the witness stand. Mr. Neel told my wife that I sounded like I was Oral Roberts. I told Mr. Neel that Mr. Bates thought it was a very good idea for me to testify, and that if I could repeat on the witness stand the same statement that I had made in his office, then Mr. Bates felt that no jury would convict me. Mr. Neel replied to this that Mr. Bates did not understand Neel's style, and that Mr.

Neel would consider these things later. On Wednesday night, of trial week, Mr. Neel finally decided that I did not need to testify. He felt that everything had gone fine and with a good closing statement, my case was in good shape. He could not have been more wrong. It took the jury less than two hours to deliberate and return a verdict of guilty against me on all counts.

I do not believe that Mr. Neel was ever interested in defending my case. From the time that Mr. Neel accepted this case until the time of my trial, a period of over six months, Mr. Neel spent only a total of nine hours with me. Mr. Neel's investigator, Joe Zeunik, spent only twelve hours with me. A great deal of this time was spent in a social, rather than professional, contact. During the week of the trial, Mr. Neel's girl friend told my wife that he did not want to defend my case."

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